IN THE HIGH COURT OF JUDIATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO.259 OF 2005
IN
FAMILY COURT APPEAL NO.146 OF 2004

Vaishali Pramod Singh Naresh .. Applicant.
Vs.
Pramod Singh Naresh .. Respondent.

Mr.M.D.Angal for the applicant.
Ms.Manda Loke for the respondent.

CORAM : SMT.RANJANA DESAI
& D.B.BHOSALE, J.

DATED : 27TH FEBRUARY, 2006.

P.C.:

1. Family Court Appeal No.146 of 2004 was disposed of on 4.2.2005 in terms of the consent terms filed by the parties. The present civil application is filed by the applicant-mother, who is the respondent in the appeal, under section 26 of the Hindu Marriage Act praying that the said consent decree be modified and custody of Harshita may be given to the applicant with right of access to the respondent on such terms and conditions as may be decided by the Court.

2. Before we deal with rival contentions we may give gist of the facts. On 13.7.1994 the marriage between the applicant and the respondent

was solemnised. In the year 1996, the daughter - Harshita was born. It appears that from December 2002 the parties started residing separately and in year 2003 the applicant filed petition being Petition No.A-341/2003 in the Family Court, Mumbai for divorce and directions with regard to the custody of child. On 10.3.2004 the consent terms were filed in the Family Court at Mumbai. The consent terms inter alia provided that the custody of daughter - Harshita shall remain with the applicant till the applicant gets married and thereafter her custody shall be handed over to the respondent-father. In view of the consent terms, the applicant withdrew maintenance petition which was pending before the Magistrate's Court at Thane. It appears that the respondent had filed an application for withdrawal of the consent terms signed by him on 10.3.2004. The Family Court by its order dated 14th September, 2004 rejected the said application and decreed the petition filed by the applicant for dissolution of her marriage. We may quote operative part of the order which reads thus:

> "The application of the respondent at Ex.24 is rejected.
>
> The petition is decreed.
>
> The marriage solemnised between the parties on 13.7.1994 is hereby dissolved by decree of divroce by mutual consent.
>
> The custody of daughter Harshita

shall remain with the petitionr-mother will she gets married and thereafter the custody of the daughter shall be handed over to the respondent-father.

Consent terms Ex.19 to for part of decree.

Parties to be returned the original document upon xeroc being filed.

No order as to costs.

Decree be drawn accordingly."

3. Being aggrieved by this judgment and order the respondent has preferred the instant appeal in this Court. On 4.2.2005 the said appeal was disposed of in terms of the modified consent terms. In the modified consent terms, the term that after re-marriage of the applicant the custody of child shall remain with respondent-father was confirmed.

4. According to the applicant on 24.10.2005 the respondent took daughter - Harshita for Diwali. On 2.11.2005 he brought her back to the applicant’s house. However, he took her away in terms of consent terms as he was told that the applicant had remarried. It is the case of the applicant that though she tried to contact Harshita on phone the respondent did not allow her to talk to Harshita. It is against the backdrop of these facts that the present application is made.

5. We have heard Mr.Angal, learned counsel for

the applicant and Ms.Manda Loke, learned counsel for the respondent at great length. Mr.Angal has relied on the judgment of the Supreme Court in **Rosy Jacob Vs. Jacob A.Chakramakkal AIR 1973 SC 2090**. Relying on this judgment Mr.Angal contended that in the matter of custody of the child, paramount consideration is welfare of the child. He submitted that particularly in case of a girl child who is of tender age of 10 years custody should be given to the mother. Mr.Angal submitted that because the mother was party to the consent terms in which she had agreed that in case she gets re-married the custody of child will be handed over to the husband she cannot be deprived of the custody of the child. He pointed out that even in Rosy Jacob's case there was settlement between the parties. Despite settlement the Supreme Court considered the facts of the case and found that the custody should go to the mother. Mr.Angal pointed out that the Supreme Court has after considering the tender age of the daughter observed that the age of the daughter at present is such that she must need the constant company of a grown-up female in the house genuinely interested in her welfare and that the daughter would need her mother's advice and guidance on several matters of importance. Mr.Angal pointed out that the facts of

the present case are also comparable with the facts of the case which was before the Supreme Court and hence this Court should also give custody of the child - Harshita to the mother.

6. Before we deal with Mr.Angal's contentions we must note that in order to find out whether child - Harshita wanted to be with her mother or father, we interviewed her in our Chamber on two occasions. On the first date the child refused to even talk to her mother, however, in order to see that she develops some rapport with the mother we passed interim order and directed that on Saturday and Sunday she should meet the mother. Our order was carried out and we are informed that the child did met her mother. We again interviewed her in our Chamber to find out whether she has developed any rapport with the mother and whether she will be willing to stay with the mother. The child refused to go to the mother. She was categoric that she wanted to stay with her father.

7. In this connection, we may refer to the judgment of the Supreme Cuort in **Sheila B.Das V. P.R.Surgasree, dated 17/2/2006 in Appeal (Civil) No.6626 of 2004.** The facts in this case are somewhat similar to the facts of the present case.

In that case, the Supreme Court was considering the question of custody of a minor girl child. Similar contention was raised before the Supreme Court that having particular regard to the fact that the minor girl was still of tender age; that she had attained the age when a mother's care and counselling was paramount for the health and well being of the minor girl and that she would soon attain puberty when she would need the guidance and instructions of a woman to enable her to deal with both physical and emotional changes, which take place during such period, the custody should be granted to the mother. The Supreme Court referred to several judgments including the judgment in **Rosy Jacob's case (supra)** on which reliance is placed by Mr.Angal. The Supreme Court noted that it had interviewed the minor girl without either of the parents being present in order to ascertain her preference in the matter. The Supreme Court was convinced that despite the tussle between her parents, she would be in a position to make intelligent choice with regard to her custody. The Supreme Court referred to the fact the minor child had informed that she had established a very good relationship with her paternal aunt, who was staying in her father's house and that she would prefer to be with the father with whom she felt

more comfortable. The Supreme Court then observed that the paramount consideration in such cases is the interest and well being of the minor. It was further observed that the child appeared to be happy in the father's company and the father appeared to be financially stable and was not disqualified in any way from being the guardian of the minor child. The Supreme Court further observed that the interest of the minor will be best served if she remains with the father but with sufficient access to the mother to visit her at frequent intervals but so as not to disturb and disrupt her normal studies and other activities. The Supreme Court thus disposed of the appeal by confirming the custody of the child granted to the father and by passing the order of access to the mother.

8. In the present case also, as already noted hereinabove, we have on two occasions interviewed the child. She appeared to us to be an intelligent child capable of making a choice. She is very much attached to the father and has no desire to go to the mother. We find the father to be a man of sufficient means who can take care of all the needs of his daughter. He appeared to us to be a stable person. His mother is staying with him. The child

appeared to be attached to his mother. The child can relate to the grandmother. We are sure that the grandmother will give her necessary guidance and advice and take care of her during the crucial period when she attains puberty. The facts of the present case are comparable to the facts of **Sheila Das's case (supra).**

9. We may also note that both in the family court and in this Court, the applicant has filed consent terms in which she has consented to the custody being handed over to the father if she remarries. The applicant has remarried. Though her remarriage and her consenting to giving up the custody of the daughter twice may not be the sole consideration, which may persuade us to deny the custody of the child to her, they are certainly important circumstances, which will have to be taken into consideration along with other circumstances while deciding the question of custody.

10. In our opinion, the reliance placed by Mr.Angal on the judgment of the Supreme Court in **Rosy Jacob's case (supra)** is misplaced. It is not clear from this judgment whether the Court had interviewed the children. In the present case, as

we have already noted, on two occasions we have interviewed the child and she has said that she does not want to go to the mother. We are aware that it is quite possible that in such cases the child may be tutored by the parent with whom she is staying. We examined this matter from that angle also. We are, however, convinced that the child really and truly does not want to stay with the mother. We do not wish to make the conversation which we had with her, public. We may only note that she is hurt about certain events which have taken place and we feel that if we force her to stay with her mother, she will suffer mental trauma. It is also pertinent to note that in **Rosy Jacob's case (supra)**, the Supreme Court has observed that there was no grown-up woman closely related to the child available for motherly advice and guidance. The facts in the instant case are totally different. Admittedly, the mother of the respondent is staying with her. In the ultimate analysis therefore we are of the view that the custody of Harshita must remain with the respondent - father. The prayer for modification of the consent decree is therefore rejected.

11. Though we have denied the custody to the applicant, she must be given access to her child.

Hence, we direct that on every Sunday at 3.00 p.m. Harshita will be taken to Eatry park at Navy Nagar by the respondent from where the applicant can take her out and be with her from 3.00 p.m. to 7.00 p.m. Harshita shall be brought back to the Eatry park at 7.00 p.m. from where the respondent shall take her home. This order shall continue to operate till the end of March, 2006. We grant liberty to the applicant to apply for overnight and vacation access after March, 2006. It is open to the parties to alter the timing and the place of meeting by telephonic communication. Needless to say that if the applicant makes telephone calls, the respondent shall allow Harshita to talk to her.

12. The civil application is disposed of in the aforestated terms.

(Smt.Ranjana Desai,J.)

(D.B.Bhosale, J.)